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IN THE

Supreme Court of the United States

OCTOBER TERM, A.D. 1971

No.

HELEN PANAS,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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To: *The Honorable, The Chief Justice and Associate Justices of the Supreme Court of the United States:*

Your petitioner, Helen Panas, respectfully prays that a writ of certiorari be issued to review the decision of the United States Court of Appeals for the Seventh Circuit.

REFERENCE TO REPORTS OF OPINIONS.

United States v. *Panas*, ... F. 2d ....., not yet reported, is attached as an Appendix.

JURISDICTIONAL STATEMENT.

The judgment of the United States Court of Appeals for the Seventh Circuit was entered on March 6, 1972. A timely motion to stay the mandate was allowed. On April 7, 1972, the mandate was stayed for 30 days.

Jurisdiction of this Court is invoked under Title 28, USC, sec. 1254 (1).

QUESTIONS PRESENTED FOR REVIEW.

An unindicted co-conspirator, the chief prosecution witness against the petitioner Helen Panas, testified that although petitioner totally disagreed with the conspirators and warned her, the witness, not to get involved (A. 37, 48), petitioner nevertheless participated in processing counterfeit money. (A. 38, 43)

During cross examination, the witness testified that she had been threatened with physical harm and was afraid of the main conspirator. When defense counsel sought to elicit the basis of her fear, a prosecution objection that the answer would be prejudicial to the main conspirator was sustained on the ground that the inquiry was "outside the subject of the direct examination." When defense counsel tried to establish that petitioner's participation was coerced, a prosecution objection was sustained on the ground that "The conclusions are for the jury to draw." (A. 44)

Questions presented are:

1. Whether petitioner was denied her Sixth Amendment right of confrontation?

2. Is it constitutionally permissible to preclude a witness from testifying to exculpatory surrounding circumstances which might have modified, nullified, or explained inculpatory actions of the accused?

3. Is it a denial of confrontation to preclude a prosecution witness from testifying to facts within the knowledge of the witness which might have exonerated the accused?

CONSTITUTIONAL PROVISIONS INVOLVED.

Sixth Amendment:

"In all criminal prosecutions, the accused shall enjoy the right to . . . be confronted with the witnesses against him . . ."

STATUTES INVOLVED.

18 USC, sec. 472.

STATEMENT OF THE CASE.

Helen Panas was indicted in Counts I, IV and VII of a seven count indictment filed November 19, 1968 together with three others. Karen Galineau was severed at the request of the government prior to trial.

Count I charged petitioner and William D'Ambrosio with passing a counterfeit $20 bill at a Drive-In on August 21, 1964 in violation of Title 18, Section 472, United States Code. The government dismissed the case against William D'Ambrosio prior to trial.

Count II charged petitioner and William D'Ambrosio with unlawfully, knowingly and willfully passing a counterfeit $10.00 bill on December 8, 1964, in violation of Title 18, Section 472, United States Code.

Count VII charged petitioner and others with conspiracy in that they did conspire, confederate and agree together and with others to falsely make, forge, counterfeit, pass and sell certain obligations of the United States and to violate Title 18, Section 472 of the United States Code.

After a jury trial, petitioner was convicted on the conspiracy and two substantive offenses and was sentenced to six months in the common jail of Cook County, Illinois on Count VII, and to five years probation on each of Counts I and IV, imposition of said sentences was suspended.

The Trial

The evidence pertaining to petitioner's participation in Counts IV and VII of the indictment consisted entirely of

testimony of two unindicted co-conspirators who stated that petitioner was present in an apartment located at 508 North Monticello Avenue in Chicago when certain counterfeit money was processed.

Chester L. Johnson, a convicted felon, stated that he came to Chicago in November, 1964, from Miami, met D'Ambrosio and Don Johnson and checked into a boarding house at Bell and Taylor Streets. That he had several conversations with the two relating to counterfeit money and ten days later he moved to 1117 North Dearborn Street. (A. 35)

That on November 24, 1964, he was arrested in Lombard, Illinois and while in custody called the Secret Service and had a conversation with agents. (A. 35) That following his release on bail, he was blindfolded and taken to the apartment at 508 No. Monticello, and saw there, D'Ambrosio and petitioner. That upon leaving, D'Ambrosio told petitioner to drop off two bottles of green ink in a carton at the printers. (A. 36)

Marguerite Swartz testified that she met petitioner in the apartment at 508 No. Monticello in November of 1964. That Cervantes and D'Ambrosio were present. That petitioner told Miss Swartz that Cervantes and D'Ambrosio were planning to make counterfeit money that she, petitioner, was definitely against it, because the last time they had done it, they hadn't gotten anything out of it. (A. 37)

Marguerite Swartz later invested $770.00 in the counterfeiting plan by withdrawing funds from her bank and giving it to D'Ambrosio. (A. 38)

She testified that on December 7, 8, and 9 she and petitioner were locked into the apartment, processing and cutting counterfeit $10.00 bills. (A. 38, 39)

While Miss Swartz stated in her direct examination that petitioner had told her that she previously had passed counterfeit money, her statement to authorities shortly after the occurrence made no reference to such conversation. (A. 37) She further admitted that petitioner didn't want anything to do with the counterfeiting, that petitioner had told her not to get involved and that she (the witness) was being taken advantage of. (A. 43)

The Government's own evidence established the fact that during the entire time of petitioner's alleged participation in the conspiracy she was sickly and pregnant. (A. 43)

On cross examination the witness Swartz testified that she herself was participating in the conspiracy under duress. "When I used the word 'duress,' I meant that I was told I had to stay there and I was completely confined and couldn't leave. Rocky told me that, and I believe he told Helen the same thing. Helen told me not to get involved with these people in making counterfeit money." She testified further that she was afraid of Rocky (William D'Ambrosio). "He threatened me physically." (A. 43)

Then the following occurred:

> Q. Will you relate what was said?
>
> Mr. Cagney (Prosecutor): I object to this, your Honor, because I know what the witness will say and it's very prejudicial to the defendant D'Ambrosio.
>
> Mr. Alwin (Counsel for petitioner Panas): I

think it's necessary to the defense of defendant Panas.

The Court: It is outside the subject of direct examination. Sustained.

The Witness (Continuing): Helen (Panas) did tell me things that made me afraid of D'Ambrosio.

Mr. Belson (Counsel for D'Ambrosio): Objection.

The Court: Sustained. The answer may be stricken.

Mr. Alwin: Q. How did D'Ambrosio act toward Miss Panas?

Mr. Belson: Objection, your Honor.

The Court: Sustained.

Mr. Alwin: Q. When you say that you were somewhat coerced into making money, don't you mean that if it is true that Miss Panas made the money, she was also coerced?

Mr. Huyck (Prosecutor): Objection.

The Court: Sustained. The conclusions are for the jury to draw.

REASONS FOR GRANTING THE WRIT.

Petitioner has been sentenced to six months imprisonment for participating in a conspiracy. At trial, her lawyer tried to show on cross examination that petitioner's participation was under coercion and fear of physical harm by the main male conspirator. Had defense counsel been permitted to develop that fact on cross examination, the jury might have acquitted her.

But there is more than the liberty of this individual petitioner involved. If this conviction is permitted to stand, it will be an invitation for government prosecutors to broaden "the already pervasive and wide-sweeping nets of conspiracy prosecutions." *Grunewald* v. *United States,* 353 U.S. 391, 404 (1957). And the broadening will be merely a fire-base from which to shoot down the confrontation clause of the Sixth Amendment.

1.

PETITIONER WAS DENIED HER SIXTH AMENDMENT RIGHT OF CONFRONTATION.

If the device employed by the prosecution in the case at bar was planned, it is so insidious that it offends the most rudimentary concepts of fair trial. But whether it was arrived at by blunder or by design the effect upon this petitioner was precisely the same—she was denied her Sixth Amendment right of confrontation. An unindicted female conspirator testified that she participated under duress and fear of bodily harm from the main male conspirator. (A. 43) When defense counsel for petitioner

sought to elicit on cross examination that petitioner, who was sickly and pregnant, likewise participated under duress and fear of the same main male conspirator, he was stopped at the threshold. (A. 44)

What was the device?

The prosecution had successfully resisted repeated attempts of the petitioner and her codefendants to be tried separately. When defense counsel for petitioner tried on cross examination to show that the petitioner had participated under the same fear and duress as the witness, the prosecution objected because "I know what the witness will say and it's very prejudicial to the defendant D'Ambrosio." (A. 44)

That objection must have taken the trial court by surprise. It was certainly most unusual coming from a prosecutor whose very use of the conspiracy mystique is designed to render the inadmissible admissible. Apparently the prosecutor felt confident that he had obtained enough testimony to convict D'Ambrosio, and that any further inflammatory showing of the degree of control that he had exercised over the two women would have caused a mistrial or guaranteed reversal and remand—or—he feared that the answer would have exonerated the petitioner. Thus, the prosecution found itself straddling the horns of a dilemma, its own creation, because of its insistence on trying the defendants together. The trial court's surprise is patent from his ruling: "It is outside the subject of direct examination. Sustained." (A. 44)

When counsel for the petitioner put the question of duress and fear directly to the witness, counsel for

D'Ambrosio got into the act with objections, and was finally joined by the other prosecutor. The court sustained the objections and stated: "The conclusions are for the jury to draw." (A. 44)

Of course the observation is true as far as it goes. But, the law does not operate in a vacuum. The jury had been deprived of facts upon which to draw a conclusion.

The petitioner had been cut off at the threshold of cross examination. She was denied her Sixth Amendment right of confrontation.

2.

CROSS EXAMINATION IS AT THE CORE OF THE SIXTH AMENDMENT RIGHT OF CONFRONTATION.

Confrontation is not for the idle purpose of having the witness and the accused ogle each other, but for the purpose of cross examination. See 5 Wigmore, Evidence sec. 1395 (1) (1940). This right of cross examination must be given "full judicial protection." *Turner* v. *Louisiana,* 380 U.S. 400, 405, 13 L. Ed. 2d 923, 927. And see *Smith* v. *Illinois,* 390 U.S. 129, 19 L. Ed. 2d 956, and authorities cited therein.

3.

IT WAS ERROR OF CONSTITUTIONAL MAGNITUDE TO PRECLUDE A PROSECUTION WITNESS FROM TESTIFYING TO FACTS WITHIN THE KNOWLEDGE OF THE WITNESS WHICH MIGHT HAVE EXONERATED THE ACCUSED.

When petitioner was precluded from showing on cross examination that she too, like the witness, was under duress and fear of the main male conspirator, she was

left to idly gaze impotently at the prosecution's principal witness against her. And the jury, the conscience of the community, was required to "draw conclusions" without the benefit of the facts that petitioner was unable to show on cross examination.

To be sure, a trial court may exercise reasonable discretion in determining when any appropriate subject of cross examination has been exhausted. It may protect a witness against any attempt to harass, annoy, or humiliate. But, it has no duty to protect a witness from being discredited short of an invasion of the witness' Fifth Amendment privilege against self-incrimination. *Alford v. United States*, 282 U.S. 687, 75 L. Ed. 624.

None of those exceptions are available in the case at bar. The petitioner was denied her right of confrontation ostensibly to protect the main male conspirator D'Ambrosio. (A. 44) And D'Ambrosio could have been protected against the answer which the prosecution knew was certain to be elicited by granting him and/or the petitioner separate trials.

To his everlasting credit the trial judge tried to correct the unfairness of the restriction of cross examination by imposing a sentence on petitioner which was only 5 percent of the sentence imposed on D'Ambrosio. But, that cannot take the place of a fair trial.

The fact remains that petitioner was denied her Sixth Amendment right of confrontation.

This was brought to the attention of the Court of Appeals on page 13 of the petitioner's Brief, but was not even mentioned in the opinion.

CONCLUSION.

Petitioner prays that this Court will consider her complaints to be of sufficient constitutional magnitude to warrant review.

Respectfully submitted,

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APPENDIX A

In the
United States Court of Appeals
For the Seventh Circuit

SEPTEMBER TERM, 1971 — JANUARY SESSION, 1972

Nos. 18009, 18010, 18302
UNITED STATES OF AMERICA,
Plaintiff-Appellee,
vs.
NEMECIO CERVANTES,
Defendant-Appellant.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
vs.
HELEN PANAS,
Defendant-Appellant.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
vs.
WILLIAM D'AMBROSIO,
Defendant-Appellant.

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 68 CR 698
WILLIAM J. CAMPBELL,
Judge.

MARCH 6, 1972

Before KNOCH, *Senior Circuit Judge,* KILEY and SPRECHER, *Circuit Judges.*

SPRECHER, *Circuit Judge.* Three defendants have appealed from their convictions by a jury of making and passing counterfeited obligations of the United States.

The defendant Nemecio Cervantes was found guilty under Counts II and VI, the defendant Helen Panas under Counts I and IV, and the defendant William D'Ambrosio

under Counts IV, V and VI, of passing counterfeited obligations of the United States with intent to defraud in violation of 18 U.S.C. §472.[1] All three defendants were also found guilty under Count VII of a conspiracy in violation of 18 U.S.C. §371 to make and pass counterfeited obligations in violation of 18 U.S.C. §§471,[2] 472, 473 and 474. Cervantes and D'Ambrosio were sentenced to ten years and Panas to six months with five years' probation.

The indictment alleged acts occurring throughout a six-month period from August 21, 1964 to February 20, 1965. It named as co-conspirators but not as defendants five persons other than the three defendants. The evidence revealed that other persons occasionally participated in the alleged criminal acts with the eight named in the indictment. Testifying on behalf of the government were three of the co-conspirators, Chester Johnson, Marguerite Swartz and John Lecas. Most of the evidence came from these three witnesses.

The evidence disclosed that Helen Panas passed a counterfeit $20 bill at a drive-in restaurant on August 21, 1964. She was with an unidentified male in an automobile registered in one of her aliases. Swartz and Lecas testified that Panas told them subsequently that she had passed counterfeit $20 bills with D'Ambrosio in the car.

On September 15, 1964, Lecas bought $2,000 worth of $20 counterfeit bills from Cervantes at the Cullerton Lounge for $700. Swartz was present; both she and Lecas testified that Cervantes had said that he received the counterfeit money from D'Ambrosio. Thereafter Swartz accompanied Cervantes in passing counterfeit $20 bills.

In the latter part of October, D'Ambrosio and Don Johnson discussed with Lecas plans to make $100.000

[1] "Whoever, with intent to defraud, passes, utters, publishes, or sells, or attempts to pass, utter, publish, or sell, or with like intent brings into the United States or keeps in possession or conceals any falsely made, forged, counterfeited, or altered obligation or other security of the United States, shall be fined not more than $5,000 or imprisoned not more than fifteen years, or both."

[2] "Whoever, with intent to defraud, falsely makes, forges, counterfeits, or alters any obligation or other security of the United States, shall be fined not more than $5,000 or imprisoned not more than fifteen years, or both."

worth of counterfeit $10 bills. D'Ambrosio drove Lecas to Wisconsin and showed him two counterfeit $100 bills which he said he had printed.

In November, D'Ambrosio told Chester Johnson (no relation to Don Johnson) that the counterfeit $10 bills would be ready soon. He took Johnson blindfolded to his apartment. Johnson was returned home by Panas, who was told by D'Ambrosio to drop off two bottles of green ink at the printers on the way.

Late in November, D'Ambrosio asked Swartz to become an investor in making counterfeit money. She gave him $770 and was promised $3,770 in return. He then took her to a stationery store to buy 100 percent rag bond paper.

For three days from December 7 through December 9, 1964, Swartz, Panas and Don Johnson were confined in an apartment at 508 North Monticello Street in Chicago, where they processed counterfeit $10 bills under D'Ambrosio's supervision. D'Ambrosio told Swartz that another group was working in another apartment and was producing the counterfeit bills at a faster rate. At about this same time Chester Johnson went to the Esquire Theatre in Chicago, where Don Johnson was the projectionist, and saw counterfeit $10 bills hanging to dry on clothes lines in the projection booth. Part of the process at 508 North Monticello and in the projection booth consisted of dipping the bills in a container of coffee and then drying them out.

On December 10, Chester Johnson, who was then working for the Secret Service, received 48 counterfeit $10 bills from D'Ambrosio and Cervantes. On December 11, D'Ambrosio and Cervantes took Swartz with them to Calumet City, Illinois, where they transferred a paper bag to a Thunderbird automobile in exchange for money. D'Ambrosio then asked Cervantes if he could get some more "garbage" counterfeit money; Cervantes replied that there was some in the washing machine in his mother's house. Thereafter Cervantes told both Lecas and Swartz that he had been selling counterfeit $10 bills in New York and Chicago.

On February 20, 1965, Don Johnson sold $8,310 worth of counterfeit $10 bills to an undercover Secret Service

agent in a bar; Cervantes was also in the bar. D'Ambrosio's fingerprint was found on one of the counterfeit $10 bills.

All three defendants contended that the government failed to prove a single conspiracy, but rather introduced evidence as to at least two separate and distinct conspiracies—a $20 counterfeit conspiracy and a $10 counterfeit conspiracy.

The fact that a conspiracy's various members may play different roles in executing it and may have dissimilar motives for participating in it, does not mean that a single conspiracy does not exist. *United States* v. *Hoffa*, 367 F. 2d 698, 706 (7th Cir. 1966), *vacated on other grounds*, 387 U.S. 231 (1967). While a conspiracy may have a small core of conspirators, other parties who join and terminate their relationships at various times in order to participate with the core conspirators to achieve a common goal may be members of the over-all conspiracy. *United States* v. *Varelli*, 407 F. 2d 735, 742 (7th Cir. 1969).

We hold that the proof in this case was sufficient for the jury to find that a single conspiracy to make and pass counterfeit money did exist and that each defendant was a knowing member of it. *United States* v. *Cerone*, Nos. 18551, 18555, 18622, 18635, Slip Opinion at 15 (7th Cir., Sept. 15, 1971), *cert. denied*, 40 U.S.L.W. 3416 (Feb. 29, 1972).

All three defendants claimed error in the failure of the trial court to grant trials of the substantive counts separate from the conspiracy count and separate from each other.

Judge Hastings had occasion to consider the problems of severance in great detail in *United States* v. *Kahn*, 381 F.2d 824, 838-39 (7th Cir.), *cert. denied*, 389 U.S. 1015 (1967), where he said:

> "Severance of offenses and defendants is discretionary with the trial court. . . .
>
> "Generally, where the indictment charges a conspiracy, or a crime having a principal and aider-abettors, the rule is that persons jointly indicted should be tried together. . . . And where proof of the charges against the defendants is dependent upon the same evidence and alleged acts, as is the case when the

charged relationship of the defendants is principal-aider-abettor, severance should not be granted except for the most cogent reasons. . . .

"Thus, with respect to a severance in a trial of co-conspirators or co-defendants, it is necessary to determine whether a joint trial infringes a defendant's right to a fundamentally fair trial. . . . This determination is made by asking whether it is within the jury's capacity, given the complexity of the case, to follow admonitory instructions and to keep separate, collate and appraise the evidence relevant only to each defendant. . . . [T]he defendants must make a strong showing of prejudice."

The main thrust of each defendant's argument as to severance is that it would have been difficult to convict upon any single count in fragmented trials. "The moving party must show prejudice, that he will be unable to obtain a fair trial without severance, not merely that a separate trial will offer a better chance of acquittal." *United States* v. *Blue,* 440 F.2d 300, 302 (7th Cir. 1971).

In this case the issues were relatively simple and the trial court gave complete admonitory instructions. A review of the evidence fails to disclose such complexity or confusion, likely to be created in the minds of the jurors to the prejudice of the defendants, which would rise to the level of an abuse of discretion by the trial court in denying severance.

It is true that the government's case depended to a great extent upon the testimony of three unindicted co-conspirators. Although conviction may rest on the uncorroborated testimony of accomplices (*United States* v. *Gebhart,* 436 F.2d 1252, 1254 (8th Cir. 1971); *United States* v. *Carengella,* 198 F.2d 3, 7 (7th Cir), *cert. denied,* 344 U.S. 881 (1952); *United States* v. *Platt,* 156 F.2d 326, 327 (7th Cir. 1946)), here there was corroborative evidence upon which the jury could also rely, such as the great number of counterfeit bills in evidence.

The trial court instructed fully on the subjects of conspiracy, testimony of accomplices and the effect on their testimony of prior convictions of felonies.

Cervantes and D'Ambrosio argued that the government's proposed Instruction 20 was erroneous on the ground that it told the jury that the indictment charged a conspiracy to pass and sell, as well as make, counterfeit money. The government correctly points out, however, that the contested paragraph of the proposed instruction was deleted at the defendants' request and was not read to the jury (Tr. 1085, 1238-39).

Defendant Helen Panas argued that the government failed to prove that she had knowledge that the $20 bill which she passed at the drive-in was counterfeit.

The mere passing of a counterfeit bill is not sufficient to show knowledge on the part of the passer that it was counterfeit. *United States* v. *Alea*, 433 F.2d 948, 949 (5th Cir. 1970); *Miller* v. *United States*, 392 F.2d 790, 792 (10th Cir. 1968); *Paz* v. *United States*, 387 F.2d 428, 430 (5th Cir. 1967); *United States* v. *Litberg*, 175 F.2d 20, 23 (7th Cir. 1949). Nevertheless, it is well established that guilty knowledge, and especially the intent to defraud, since it can rarely be shown by direct evidence, may be found by the jury from the total actions of the defendant (*Miller*, *supra* at 792). The jury may scrutinize the entire conduct of the defendant at or near the time when the money was passed (*Paz*, *supra* at 301; *United States* v. *Carlson*, 359 F.2d 592, 597 (3d Cir.), *cert. denied*, 385 U.S. 879 (1966)) and may consider evidence of like offenses (*United States* v. *Platt*, 156 F.2d 326, 327 (7th Cir. 1946)).

The fact that, a few months after the passing of the $20 counterfeit bill at the drive-in, Panas actually participated for three days in the processing of $10 counterfeit money, as well as her delivery of two bottles of green ink to the printer and her telling two witnesses that she had previously passed counterfeit money, warranted the jury's finding that Panas had guilty knowledge and specific criminal intent to pass a counterfeit bill. *United States* v. *Dodd*, 444 F.2d 1402, 1403 (8th Cir. 1971); *United States* v. *Trotter*, 433 F.2d 113, 116 (7th Cir. 1970), *cert. denied*, 401 U.S. 942 (1971); *United States* v. *Casey*, 431 F.2d 953, 954 (5th Cir. 1970); *United States* v. *Jonikas*, 187 F.2d 240, 242 (7th Cir. 1951), *cert. denied*, 344 U.S. 877 (1952); *United States* v. *Kelley*, 186 F.2d 598, 603 (7th Cir.), *cert. denied*, 341 U.S. 954 (1951).

Finally, Cervantes and D'Ambrosio have argued that the proof was not sufficient to warrant the jury's finding them guilty under Count VI, which involved the sale of 831 counterfeit $10 bills to a Secret Service agent. We have examined the entire record closely and find the evidence sufficient.

The convictions of all three defendants are affirmed.

A true Copy:

Teste:

.....

Clerk of the United States Court of Appeals for the Seventh Circuit.